White Paper on The Planning Act

BACKGROUND PAPER 2

Some Legal Implications of the Report of The Planning Act Review Committee

Government of Ontario

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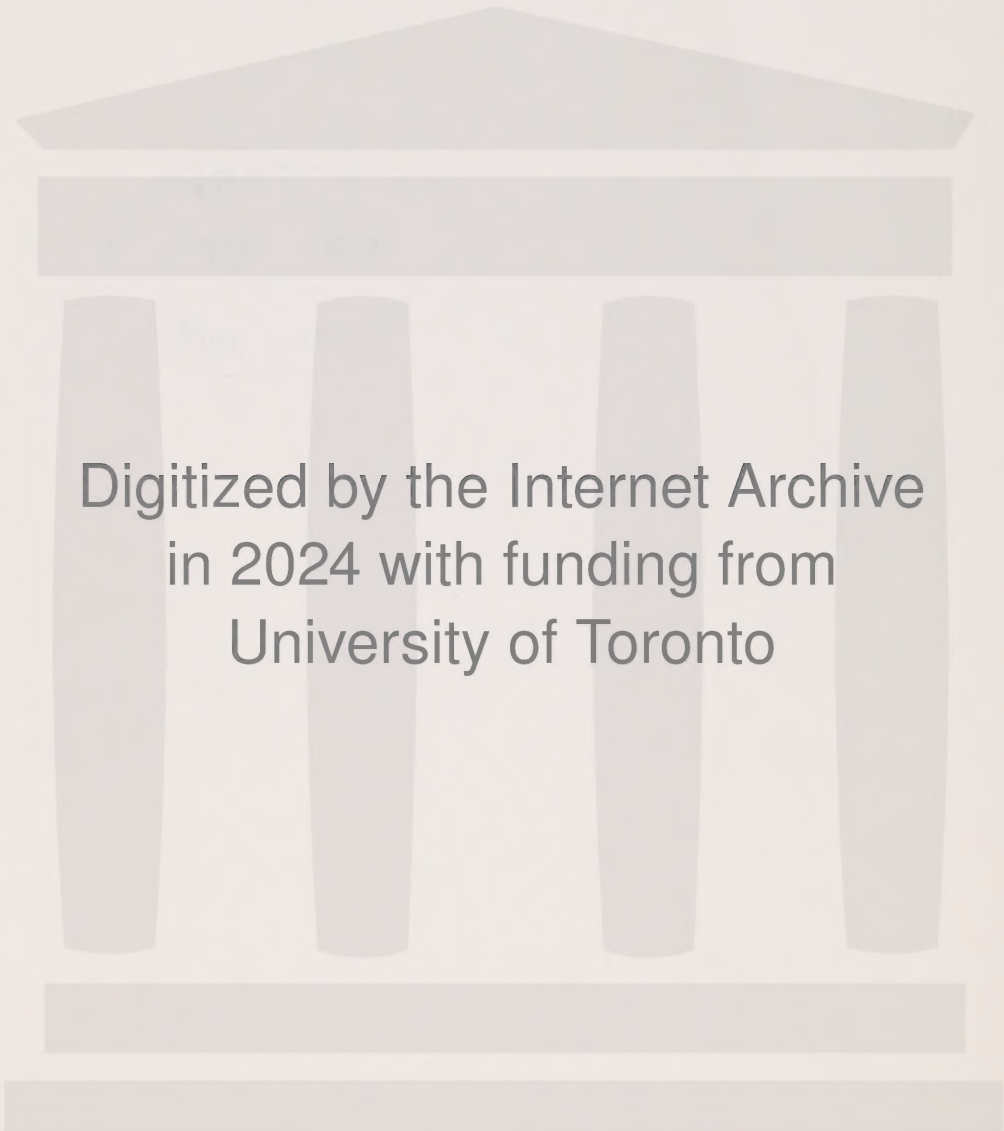
WHITE PAPER
ON THE PLANNING ACT
Background Paper 2

SOME LEGAL IMPLICATIONS OF THE REPORT OF THE PLANNING ACT REVIEW COMMITTEE

Prepared for the Ministry of Housing by
G. J. Smith, Q.C.,
Weir and Foulds,
Barristers and Solicitors.

May 1979



CONTENTS

ANALYSIS OF THE LEGAL IMPLICATIONS OF THE RECOMMENDATIONS OF THE PLANNING ACT REVIEW COMMITTEE

INTRODUCTION

To assist the government in examining certain areas of the PARC Report, Mr. G. J. Smith, Q.C., a lawyer in private practice with extensive experience in planning and municipal law was retained to conduct investigations into the legal implication of two of PARC's recommendations.

Specifically, Mr. Smith was asked to examine:

1/ Ontario Municipal Board

The recommendations contained in Chapter 10 of the PARC Report that would restrict the grounds of appeal to the Ontario Municipal Board on any planning matter to whether a municipal council's behaviour in reaching or failing to reach a decision was unfair or unreasonable, or that the council acted or failed to act on the basis of information or advice that was incorrect or inadequate.

In examining this matter and other related recommendations in Chapter 10, to also examine the complexities of the proposed appeal process including the time factor, to analyse and discuss the major differences between the proposed and existing systems, and point out any major problems in law or administrative practice which might be created by the recommendations.

The examination should also take into account the recommendations relating to the role of the Ontario Municipal Board in the municipal planning process made in the Report of the Select Committee on the Ontario Municipal Board, 1972.

2/ Legal Effect of Official Plans

The recommendation contained in Chapter 6 of the PARC Report that the provisions contained in section 19 of The Planning Act which provides "legal status" to official plans be deleted and replaced with a provision whereby municipal councils and all municipal bodies should be required instead to "have regard for" the adopted municipal planning policies in all of their actions.

The investigation should determine whether the "have regard for" proposal is, as the report states, "an accepted legal convention", and just what manner of legal onus, if any, would be placed on a council by the use of this wording.

In addition, the report should discuss whether the suggested change of wording would eliminate any of the existing problems that are identified by PARC as arising from the present section 19 and what new problems, if any, might develop as a result of using the "have regard for" wording.

Mr. Smith's report to the Ministry was in the form of two letters, one on each of the two subject areas. These are reproduced essentially in the same form as submitted.

TO: Ministry of Housing

FROM: G. J. Smith, Q.C.
Weir and Foulds

RE: Analysis of Legal Implications of the Recommendations of the Planning Act Review Committee:

Ontario Municipal Board

It is appropriate at the outset to state certain assumptions which should be appreciated in determining the weight to be given to the opinions expressed.

Firstly, in Ontario we do not have the constitutional safeguards which will permit the Courts to intervene in very many cases to prevent injustice or undue hardship. While at common law by-laws might be struck down as being unreasonable, the Municipal Act has specifically eliminated that as a ground of attack and our Court of Appeal has applied this standard of non-intervention to the exercise of powers under The Planning Act. In this vacuum the Ontario Municipal Board has played a very important role in preventing undue hardship in circumstances where there was no other recourse. It has over the years developed a philosophy which has been of comfort to both ratepayer and developer interest groups depending upon the then current attitudes of the dominant groups within municipal Councils. Obvious examples are the positions taken by the Board in connection with protection of single-family areas from inappropraite high density development, the insistence of the Board upon policies which will permit an owner to use his property although designated for some public purpose in the event it is not acquired by the relevant public authority, and the recognition given by the Board to the reliance placed

upon or commitments made in reliance upon representations made by municipalities.

These are matters which go beyond and which are unrelated to the behaviour of Council in reaching or failing to reach a decision or in the information considered by Council. Municipalities generally recognize the significance of the Board's role in this regard: this is a restraining influence. The government will have to determine whether rights such as I have described if worthy of protection, can be adequately protected in some other way or whether they should be subservient to the aspirations for local autonomy.

Secondly, the Committee appears to view the primary issue as resolving the conflict between aspirations for local autonomy and the Board's role as an instrument of provincial policy. I recognize that the role which the Board has played from time to time in respect to implementing provincial policy has attracted much criticism. That is a political issue. What is important from a lawyer's stand point is that there be an appreciation for the role played by the Board in the other areas referred to. The Committee has, in my view, overemphasized the role which the Board and the Province have played in seeking to ensure that the right planning decision is made and failed to give sufficient weight to the Board's role in ensuring a just and consistent result. While one might make a political decision to sacrifice a provincial view of what is good planning throughout the Province, one must not lose sight of the Board's other role.

It is not difficult to envisage the Courts developing new concepts of "bad faith" to replace the supervisory jurisdiction of the Board if its powers in this regard were to be eliminated. For example, if there were no "appeal" on the merits the Courts might reconsider their

declining of jurisdiction to strike down zoning by-laws as unreasonable. Unlike the Municipal Act, there is no express statutory prohibition preventing the Court from striking down a by-law as unreasonable. Abrupt policy changes might be construed as being in bad faith having regard to commitments made on the faith of earlier policies. Different principles might be applied on issues of bias. Until now the Courts have relied upon the Board to provide the necessary protection.

Thirdly, the Committee recommendations assumed that a municipal Council, if vested with this broader authority, would shed its political role and become a dispassionate Judge divorced from campaign promises and pressure groups. This expectation is unrealistic. Moreover, it has not been the experience of the bar that any municipal Council has taken kindly to criticisms from the Ontario Municipal Board. This makes me sceptical of any appeal procedure which depends for its ultimate force upon a municipal Council embracing criticisms from the Ontario Municipal Board and voluntarily undertaking to implement its recommendations. In many areas today the planning process operates successfully on the confontation approach with good and fair results being achieved through compromise only because both sides know that there is an ultimate arbiter.

A good example of the futility of an inquiry and reporting procedure where the authority has no obligation to abide by the report can be found in the inquiry procedure under the Expropriations Act. There are numerous examples of situations where Inquiry Officers have found that proposed expropriations are not "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority" and the authority has summarily determined to proceed with the expropriation notwithstanding such reports. There is even a recent example of a provincial agency refusing to tender

evidence upon such an inquiry in respect to an issue which had been determined by the Ontario Court of Appeal to be relevant. The agency appeared to be prepared to risk the wrath of the Inquiry Officer knowing that his report was not binding.

Turning to the Committee recommendations more specifically, the proposed change in the role of the Ontario Municipal Board whereby it would become merely an inquiry and recommending body has serious legal implications in respect to the principles of "natural justice". Our Courts have characterized the zoning process as "quasi-judicial". When so characterized, in the absence of statutory provision to the contrary, the common law requires that anyone whose rights may be affected by that process be given a hearing. The Court of Appeal in Zadrevec v. City of Brampton, [1973] 3 O.R. 498 (C.A.) found that this requirement of natural justice before a municipal Council was inapplicable where there was a right to a hearing before the Ontario Municipal Board and the Board had the power to prevent the by-law from coming into force.

The system of hearings proposed in the Committee recommendations would, in my opinion, undermine the reasoning of the Court of Appeal and, in the absence of a specific provision in the legislation, would put one back to the common law position requiring a hearing. I recognize one might argue that the reasoning of the Court of Appeal in Zadrevec v. City of Brampton could still apply because of the supervisory jurisdiction exercised by the Minister. However, the Minister's role applies only in respect to one aspect of the Council's deliberations. In the absence of specific legislative provision, it is my view that the Court would impose such an obligation upon the Minister. In any event, the recommendations of the Committee are predicted upon members of Council having applied an independent judgement with a full appreciation of all relevant facts.

Any amending legislation should address itself specifically to this point and to the role of the Minister with particular reference to whether the Minister is under an obligation to conduct a hearing.

The right to a hearing could have serious consequences both in respect to the procedures of municipal Councils in considering zoning by-laws and in respect to the new avenues for Court challenges which would be available. Some examples of possible bases for attack suggested by existing precedent are:

(i) Members of Council making the ultimate decision may be required to have participated in each and every one of the prior meetings at which the matter was considered with each member being present at all times during all representations; if this rule were applied to current Council deliberations, there would be very few instances where a quorum could be assembled for the final decision.

(ii) Members of Council who have taken public positions on particular issues may be disqualified from participating in Council's deliberations on the grounds of bias.

(iii) Council's members may be disqualified by or prevented from discussing or receiving representations in respect to zoning issues except at Council's formal hearings; it would be as improper for a ratepayer to seek to get his point across to his local councillor privately as it would be for a lawyer for one of the contending parties before the Ontario Municipal Board to discuss the merits of an application privately with a Board member.

(iv) It would be incumbent upon Council to permit the calling of evidence and the cross-examination of witnesses including the cross-examination of staff planners before Council. Apart from the fact that it would be physically impossible for a municipal Council to find enough time to conduct such hearings together with its other business, municipal Councils are not trained nor, having regard to their changing membership, will they ever become sufficiently experienced to conduct hearings in such a manner as not to give scope for a challenge in the Courts to their proceedings.

(v) In the absence of further statutory clarification, the decision of the Divisional Court in Re Hershoran and City of Windsor (1973), 1 O.R. (2d) 291 at 312, affirmed (1974) 3 O.R. (2d) 423 suggests that notwithstanding the provisions of Section 3(2)(h) of the Statutory Powers Procedure Act, 1971, that Act would apply to a municipal Council when it is required to act quasi-judicially in the exercise of its legislative functions.

An immediate reaction to the concerns I have listed above would be to draft new legislation so as to make clear that attack could not be taken upon Council proceedings on such grounds. However, it is my view that a requirement that Council act in accordance with those requirements is fundamental to the Committee recommendations as to the role of the Ontario Municipal Board as an appellate body. The very requirements which would be inappropriate or troublesome to proper consideration of such a matter by a municipal Council are those which have been developed to insure that the behaviour of a body exercising such authority is not "unreasonable or unfair" and that such authority does not act upon "incorrect or inadequate information or advice". These

principles are an attempt by the Courts and latterly by the legislature to define some minimum standards to be applied in the consideration of such matters to insure a modicum of "natural justice".

Looking at the matter from a non-legal vantage, if one did not have the right to a full hearing before a municipal Council including the right to call witnesses and cross-examine, there would be very few cases which would not be sent back by the Ontario Municipal Board for further consideration on the ground that "the Council acted on incorrect or inadequate information or advice". Further, the principle that local autonomy should be given weight when it makes a decision based upon correct and adequate information and advice can only have validity when all of the members of Council participating in that decision have that information and advice. Thus, on principle, and without regard to any legal precedent, it is a logical conclusion that those who are to make such a final decision should have participated in all proceedings and should not be influenced by private representations or lobbying which do not form part of the record to be tested for adequacy and accuracy.

It is my view that this aspect of the Committee's recommendation is unworkable in practical terms. The Committee does not question the right of individuals to "natural justice" but suggests a procedure which would only work in a perfect world which would not need the Ontario Municipal Board.

Turning directly to the two proposed grounds of appeal, I am unclear as to what the Committee intended to encompass by unreasonable behaviour on the part of Council. The use of the word "unreasonable" in conjunction with "unfair" suggests that the Committee is concerned with something more than the conduct of the proceedings

before Council. I have indicated earlier that the Courts have to date declined to intervene in planning matters upon grounds of unreasonableness but that this attitude might be different if the structure of The Planning Act were to be changed. If the government were prepared to implement the Committee recommendations, considerable care would have to be taken to insure that redrafting of the legislation did not inadvertently encourage judicial review of the reasonableness of Council action. While I personally believe that some sort of review is necessary, I do not think it practical to abandon this jurisdiction to the Courts and would hope that if the Committee's recommendations were to be pursued that the Board's appellate jurisdiction include the power to consider cases where it is alleged that the decisions of Council and not merely its behaviour were unreasonable.

Again, I have difficulty with the distinction drawn in paragraph 10.11 between "extreme violations of the process requirements" which are said to be matters for a Court determination and "grievances against less extreme but still unfair or unreasonable Council behaviour" which should be determined by the Ontario Municipal Board. At the present time, in the absence of bad faith or illegality the Courts will generally defer to the Ontario Municipal Board. However, if there is a dual jurisdiction for challenging improper behaviour with the standard being a matter of degree, there is no doubt in my mind that lawyers would prefer the Court route and would be successful in interesting the Courts in assuming jurisdiction in more cases than contemplated by the Committee. I say that a Court route would be preferred because of the subordinate role being recommended for the Ontario Municipal Board. These observations are to some extent speculative because I have difficulty appreciating the distinction proposed by the Committee. However, I proceed on the premise that where there is no

alternative remedy the Courts have to date overcome efforts to preclude their intervention to prevent injustice.

At the present time, there is no statutory restriction upon the scope of considerations relevant to the exercise by the Board of its power to review municipal decisions. With respect, the recommendations of the Committee do not give proper recognition to the self-imposed restrictions adopted by the Board as a matter of policy in exercising these powers. As a general rule, the Board will not interfere with the exercise of a Council's discretion unless it is demonstrated that Council's action was not clearly for the greatest common good, that it created an undue hardship, that some private right was unduly interfered with or denied, that the Council acted arbitrarily on in-correct information or advice or otherwise improperly. See Re Hopedale Developments Limited and Town of Oakville, [1965] 1 O.R. 259. The Board has for the most part restricted itself to the appellate function recommended by the Committee and has required parties contesting decisions of municipal Councils to demon-strate that a case has been made out on the basis of those principles to justify its interference with the decision of an elected Council. Depending upon what is encompassed by "unreasonable behaviour" these principles are not that much different from the principles which would be applied by the Board in the exercise of an appellate jurisdiction as proposed by the Committee in determining whether a Council decision was "unreasonable or unfair" or based upon "incorrect or inadequate information". While it is difficult to define these two concepts, it is my view that the jurisdiction that would be specifically imposed may, with a generous Court interpretation, be broader than the actual jurisdiction asserted by the Board in practise under the present legislation.

I have already indicated the problems involved in ensuring that each member of Council participating in the final decision have all of the relevant information so that a Council decision could not be said to be subject to reconsideration on the basis that the Council acted on incorrect or inadequate information or advice. This is only one aspect of the administrative problem at the municipal level. The Committee has recommended under paragraph 10.40 that there be a record of Board proceedings. In my view it would be less important to have a record of Board proceedings than to have a record of Council proceedings if the Board is to exercise a truly appellate function. How can one establish what information was before the Council by way of witnesses and exhibits if there is not a proper record. As most zoning matters proceed over a number of meetings and a long period of time, the necessity of such a record is all the more important to determine what was said on any particular issue. In the absence of such a record, the role of the Board could become impossible as it would have to establish as a preliminary matter what evidence was in fact tendered to the Council. The cost implications of such a record would be significant.

On contentious planning issues there are generally divergent planning opinions. It would be unseemly for Council to have to pass upon the credibility of contending opinions put forward by its own staff and those of proponents. It is one thing for a municipal Council to elect in a particular case to disregard the recommendations of staff. It is another thing for it to have to make a decision on the merits of contending planning opinions following cross-examination and a hearing.

Presumably the Committee recommendations are intended to prevent the Board from reviewing findings of credibility. In such an event, the Board would have no

function in extreme cases where Council's decision has been based upon a clearly erroneous planning assumption unless jurisdiction could be asserted on the basis that Council's behaviour was unreasonable. However, the Courts have taken the view that an appellate body should not interfere where findings of fact are involved if there is some evidence upon which a decision could be based. It is a moot point what respect a Court would give such findings of fact in a hard case if the Board took a narrow view of its jurisdiction. I can envision much litigation based upon jurisdictional arguments.

In paragraph 10.3 the Committee has emphasized the functions of the Board as a provincial agency insuring that municipal planning actions do not impair provincial interests nor infringe upon the civil liberties of persons affected by the municipal planning decisions. It is my view that the protection of provincial policies is not as important as the protection of civil liberties. There is adequate recourse for the Province either as a participant in hearings or by way of appeal to the Cabinet to insure that its interests are not impaired. However, the Board cannot adequately protect civil liberties if it is prevented from addressing the merits of a particular proposal and is restricted simply to ensuring that Council was aware of the impact of its actions upon a particular individual.

One of the Committee's concerns is that non-elected persons are sitting in judgment on the decisions of elected Councils. One should note that the Minister would not be able to give personal attention to each matter referred to him for decision under the Committee's recommendations. This would result in the transfer of power from one non-elected group of

provincial appointees to another: from a "public" administrative tribunal to provincial civil servants who are clearly more directly responsible to and instruments of the provincial government. Whatever confidence the Board enjoys in the public perspective at the present time derives entirely from its relative independence.

A good part of the present concern with the role of the Board is the result of the delays in the planning process. It is my view that so long as one accepts the principle of "participatory democracy" such delays are inevitable. Unfortunately, the Board appears to bear the brunt of complaints as to delay which is the combined result of procedures at the municipal and various provincial levels.

In my opinion the recommendations of the Committee will aggravate this problem. The process at the municipal level will become more complicated and cumbersome. It will be more difficult to arrange meetings having regard to the requirements of formal notice to insure the integrity of the proceedings and the need to accommodate members of Council to insure continuity of participation. The lead time in obtaining a Board hearing date will not be avoided. The actual hearing might be shorter if there is a transcript of the proceedings at the Council level and the Board is precluded from considering the weight to be given to the opinions of contending experts. If there is no transcript, much time may be lost in trying to determine what was the record before the Council. As the Board would be required to make a report, it can be anticipated that the time awaiting a decision will be longer. It will not be possible for the Board to give oral decisions except in the rare case where there are no grounds for interference and no new evidence has been brought forward.

In all other cases, the new procedure requires a delay

for further consideration either by the Minister or by the Council. Assuming it were incumbent upon the Minister to review the Council's decision by reason of its conduct in the proceedings, it would be unseemly for the legislation to specifically preclude the right to make further representations to the Minister. Even if these additional representations did not involve a formal hearing, there would be additional delay. Considering the sensitivity of the Province in matters such as this, and the time taken to dispose of Cabinet appeals, a further significant delay could be anticipated.

Assuming the matter was sent back to the Council for reconsideration, one would be faced with further delay even if the Council elected not to hold a hearing. However, it would be reasonable to expect that a Council would hold a new hearing if only to avoid the imputation that its behaviour in reconsidering the matter was unreasonable or unfair. The time required for completion of the process in a particular case could be further extended if there were a complaint that the Council's behaviour in reconsidering the matter in the light of the additional information was unreasonable or unfair. This would involve further lead time in getting an appointment, getting a decision and getting action by the Minister upon that decision assuming that the Board were to uphold the complaint of unfairness or unreasonableness. Leaving aside the possibility of a Cabinet appeal (and assuming that only one Cabinet appeal from the final decision will be permitted), it would not be unfair to suggest that the average time involved between the first considerations of contested applications and final disposition apart from any Cabinet appeal, could easily be doubled.

In giving this time assessment, I have not taken into account the increased opportunity for applications to the Courts which will arise no doubt from the additional

complexity and also from the unaccustomed role which municipal councillors will be called upon to play.

As requested, I will consider briefly the recommendations made in The Report of The Select Committee on The Ontario Municipal Board, 1972 relating to the role of the Ontario Municipal Board in the planning process. As in the case of the recommendations of the Planning Act Review Committee, I will not deal with the various administrative and procedural suggestions except to the extent that they bear directly upon the powers of the Board. I might say, however, that The Select Committee Report was generally well received and it is unfortunate that more of its recommendations were not implemented. If this had been done, some considerable part of the impetus for a "repatriation" of the planning process would have been removed.

Recommendation XIII that The Ontario Municipal Board Act and The Planning Act be amended to make clear that an objection or an appeal to the Board will be treated as an appeal and not as a hearing de novo is desirable. While, as I have noted, the actual practice of the Board is to impose an onus upon the individual objecting to the municipal Council's decision, the present procedure does require the municipality to justify its position and to present a complete case on all aspects of the application. In some cases, the panel is able to isolate the issues and to direct the evidence. However, many objections proceed on the basis that all issues will be tested in the hope that the municipality will be found wanting in its presentation on some particular aspect. The proposed amendment would formally recognize the significance attributed by the Board to the local decision. Further, putting the onus upon an objector and requiring the objector to proceed first in the presentation of evidence would expedite hearings.

The Select Committee in Recommendation XIV encouraged the Board to hold preliminary hearings regularly in Toronto and elsewhere throughout the Province to dispose of frivolous or irrelevant objections and to define issues. I agree in principle with that recommendation but think that it should be related to an amendment to The Planning Act to clarify or if necessary to broaden the jurisdiction of the Board to dispense with a hearing even where there is an objection.

Section 35 of The Planning Act provides as follows:

> "(12) Except as provided in subsections 13 and 14, the Municipal Board shall, before approving any by-law passed under this section, hold a public hearing for the purpose of inquiring into the merits of the application and of hearing any objections that any person may desire to bring to the attention of the Municipal Board.
>
> (14) Where notice has been given under subsection 13, the Municipal Board may, when no notice of objection has been filed with the clerk within the time specified in the notice, approve the by-law without holding a public hearing and, if one or more objections have been filed with the clerk within the time specified in the notice, the Municipal Board shall hold a public hearing unless under all the circumstances affecting the matter the Municipal Board considers the objection or, if more than one, all the objections to be insufficient to require a public hearing".

It is my view that the Board cannot dispense with a public hearing on the ground that the objection or objections are "insufficient to require a public hearing" without giving the objector an opportunity to be heard.

The Board's present practice is to proceed by way of a motion for directions to dispense with the holding of a public hearing. In my opinion the Act should be amended to permit the Board of its own motion to dispense with the need for a public hearing without

a motion where it is apparent from the wording of the objection that it is irrelevant or entirely devoid of merit. While the present legislation is broad enough to permit the Board upon a motion for directions to dispense with the need for a public hearing, it does put the onus upon the parties seeking approval to establish the insufficiency of the objection.

Further, recognizing the weight that the Board does and should give to local decisions, it would be appropriate for subsection (12) to stipulate that the Board may on motion after notice to the objector dispense with the need for a public hearing in the event the objector has not shown sufficient cause to require a public hearing. There is little likelihood of abuse in permitting the Board to dispense with a public hearing without a motion and the combined effect of the two suggested changes would be to provide a psychological readjustment and perspective which will encourage a freer use of the power to dispose of matters on motion. At the present time, one can claim a hearing as a right and argue that dispensing with a hearing is a power which should be sparingly exercised. If one accepts the principle contained in Recommendation XII and recognizes the delay, time and expense involved in forcing an unnecessary hearing, there is no reason why an objector should not have to show cause why there should be a public hearing.

At the present time, municipal Councils are reluctant to ask the Board to dispense with a hearing. Some Board members are similarly reluctant to accede to such requests treating them as reserved for very exceptional cases.

I recognize that a more frequent use of motions for directions will add a further step to the proceedings in some cases. However, that delay will affect only applicants who seek in an improper case to dispense with a public hearing.

The amendment I am suggesting should specifically empower the Board on a motion for directions to permit the matter to go for public hearing on defined issues or at large as the Board might direct depending upon the facts of the particular case. This will expedite the hearing and reduce cost where the particular matter or matters in dispute can be identified and isolated.

Both the Select Committee and the Planning Act Review Committee recommend the implementation of subsections (24) to (27) inclusive of Section 35 of The Planning Act. I agree that this step should be taken and that it will alleviate the work load of both the Board and the Ministry in its reporting capacity to the Board. I am concerned, however, with the Select Committee's suggestion that a by-law which comes into force by effluxion of time under this procedure be deemed to comply with the Official Plan. There should be some minimum requirement that the declarations which are required under that procedure to include a certificate from the Council by resolution or the municipal planner as to conformity with the Official Plan. I am not suggesting that the legislation include these as an option but merely that there be some specific provision requiring Council to address itself to this issue. If there is not some restraint, local pressures may be such that Councils might proceed contrary to an Official Plan relying upon their ability to deal with individual objectors.

I support strongly the Select Committee recommendation that the rights of appeal be restricted and that the

power of the Board to review its own decisions should be restricted as to time and extent as suggested by the Select Committee. While I agree that appeals to the Cabinet should be restricted, I query whether it is necessary to complicate the procedure by a further preliminary hearing. In place of Recommendation XXIV I would prefer that the right to appeal to Cabinet be restricted to grounds involving deviation from government policy and situations where there is no government policy and the issue is of provincial significance.

Such restricted grounds would by themselves reduce the number of appeals. The Province by an effective screening procedure could quickly dispose of those which did not meet these criteria. I am concerned that the very existence of the right to a further hearing before the Board would in many cases encourage that route being taken merely for the delay factor involved. Again, it creates an unnecessary additional step in the process.

TO: Ministry of Housing

FROM: G.J. Smith, Q.C.
Weir and Foulds

RE: Analysis of Legal Implications of the Recommendations of the Planning Act Review Committee:
Section 19: Legal Effect of Official Plans

It appears from chapter 6 of the Report that the Planning Act Review Committee has the following concerns arising from the present Section 19:

- the Official Plan does not require municipalities or other public bodies to carry out works or programmes necessary to achieve the plan

- it does not restrict municipalities from carrying out programmes or undertakings of a non-structural nature

- it does not restrict provincial and federal governments in carrying out their own works

- it operates indirectly upon private activities through the constraints it imposes upon zoning

- it produces misleading public expectations that the municipality must act positively to carry out the plan

- it can lead to inflexible plans

- the conformity provision turns the plan into a legal instrument rather than a planning instrument

- Councils may exclude from the plan important policies or programmes so as to have flexibility without going through the amendment process

- significant planning formulations are kept out of the plan or are expressed as generalities

On the positive side the Committee indicates that the Section gives landowners a degree of protection against rapid changes in municipal policy.

The Committee has suggested that the words "have regard for" would overcome their specific concerns as to the present wording which I have enumerated. They have made this recommendation on the basis that the phrase "have regard for" has a defined meaning in law which is capable of legal interpretation and enforcement and that accordingly, the change would not result in any uncertainty as to the meaning of the statute if it were so amended.

It does not appear that the Committee is concerned as to there being any uncertainty as to the meaning of the present Section 19. Rather, the change suggested is predicated upon policy considerations.

A. In this part, I will review some of the more significant cases bearing upon the interpretation of the words "have regard for".

1. Simpson v. Edinburgh, [1960] S.C. 313 (Scottish).

In this case, the relevant section of The Town and Country Planning Act, 1947, p.12(1) was as follows:

> "Subject to the provisions of this and the next following section, where application is made to the local planning authority for planning permission, that authority may grant permission either unconditionally, or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations".

the applicant sought to have declared ultra vires, planning permission granted to the respondent as the former claimed such was in derogation of the development plan of the City of Edinburgh. Lord Guest dismissed the application and in so doing, had the following observations on the use of the phrase "have regard to".

> "Section 12, which has already been quoted, obliges the local authority, in dealing with applications for planning permission, to have regard to the provisions of the development plan so far as material thereto and to any other material considerations. It was argued for the pursuer that this section required the planning authority to adhere strictly to the development plan. I do not so read this section. 'To have regard to' does not, in my view mean 'slavishly adhere to'. It requires the planning authority to consider the development plan, but does not oblige them to follow it. ....If parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it".

This case is authority for the view that the subject phrase is of a directory as opposed to mandatory nature. The obligation placed on a municipal Council by the use of such a phrase is merely to consider the contents of the Official Plan, but the Council is by no means bound by such content.

2. Ishak v. Thowfeek, [1968] 1 W.L.R. 1718 (P.C.).

This case concerned the interpretation of p.14(1) of the Muslim Mosques and Charitable Trusts of Wakfs Act, 1956 (Ceylon) which directed that a trustee was to be chosen for a mosque as soon as the mosque had been registered. The same section provided that such trustee was to be appointed by the relevant authority which "shall have regard to" four specified matters. The appellant attacked the appointment of the respondent as trustee on the grounds that the latter's appointment was in derogation of p.14(1) of the aforementioned Act. In dismissing the application, Lord Pearson said:

> "It is said that if there was a purported appointment of the plaintiff (respondent) as trustee, it was invalid as contrary to the provisions of p.14(1) of the Act. It is true that the subsection states in paragraphs (a), (b), (c) and (d), matters to which the Board in selecting a person or persons as a trustee or trustees of a mosque are 'to have regard', and that all or most of these matters would be in favour of appointing the defendants (appellants) as trustees. This position, however, was clearly recognized by the Board at their meeting of August 22nd, 1959, recorded in their minutes. They decided nevertheless not to appoint the defendants as trustees because they were in the opinion of the Board unsuitable. Clearly that was a good reason if one the true construction of the subsection the Board had a discretion. ....The requirement that the Board 'shall have regard' to certain matters tends in itself to show that the Board's duty in respect of these matters is limited to having regard to them. They must take them into account and consider them and give due weight to them, but they have an ultimate discretion and are not bound to select a person or persons whom they consider unsuitable".

The Privy Council was of the view that a direction in a statute "to have regard" to certain matters when considering certain action, is to be seen as merely a guide in how such action is to be taken. The authority involved is by no means bound to take action solely on the basis of the matters they are directed "to have regard", though prior to taking such action, the authority must at least direct their minds to such matters, or the existence of such matters.

3. Rathbone v. Abel, [1964-65] 38 A.L.J.R. Australia.

This case concerned an application to determine the fair rent to be charged for a certain dwelling house pursuant to The Landlord and Tenant Act, 1948-61 (N.S.W.). Section 21(1) of this Act prescribed factors which the Court was "to have regard" when

ascertaining the fair rent for the subject dwelling. The lower Courts had held that this requirement in Section 21(1) "to have regard" to certain matters meant that the Court should base its determination upon these listed items exclusively. Chief Justice Barwick disagreed.

> "Whilst, of course, it may not be universally true that a direction 'to have regard to' certain facts or circumstances does no more than require the tribunal to which the direction is given to consider whether it should give any and, if so, what weight to the particular fact or circumstance when performing the duty or exercising the right which is given to it, it can, I think, be said that in general a direction in such terms does not do more than that. In my opinion, the direction in the Act 'to have regard to' the list of matters set out in Section 21(1) is no more than a direction to the Fair Rents Board, when determining the fair rent of premises, to consider each of these matters and determine for itself whether any, or any particular weight should be given to them when arriving at its conclusion".

The interpretation of the subject phrase by Chief Justice Barwick illustrates that when such a phrase is employed, the relevant authority is to consider and set its mind to the listed criteria and also to any other consideration of relevance. The listed items are not an exclusive criteria but are more accurately described as a guide to be used to come to a determination. This obligation to set its mind to the enumerated factors will be shown later to be a very minor obligation placed on the relevant authority.

A further point to note is that in arriving at his decision on the meaning to be accorded the subject phrase, Chief Justice Barwick compared the present wording of the relevant Act, to the wording employed in past acts of the same subject matter.

> "The direction 'to have regard to', in any case, but particularly when contrasted with the rigid formula prescribed in earlier legislation does not, in my opinion, require the Board to adopt any particular method of determining the fair rent".

The use of this methodology allowed the Chief Justice to conclude that the subject phrase is "a guide but not a fetter". Perry v. Wright, [1908] 1 K.B. 441. Further, this method of approach would be of particular significance when the proposed amendment to Section 19 of The Planning Act comes before a Court in Ontario for interpretation. Seemingly, the Court would be at liberty to ascribe to the phrase a meaning similar to that of Chief Justice Barwick, based on a comparison between Section 19 as amended, and prior to amendment. An Ontario Court could conclude that a municipal Council, in enacting a zoning by-law, was free to consider and "have regard to" not only the Official Plan, but also any other consideration which it deemed to be of relevance.

4. Lape v. Lape [1918], 124 N.E. 51, Supreme Court of Ohio.

The case involved the interpretation of Section 11990 of the General Code of Ohio which prescribed that in ordering alimony to a wife, the Court was to perform this task "having due regard to property which came to him (husband) by marriage and the value of his (husband) real and personal estate at the time of the divorce". The interpretation given this portion of Section 11990 was as follows:

> "'Having due regard' is clearly a directory clause, and not of mandatory or all controlling influence. 'Having due regard' does not mean that other facts, circumstances or conditions cannot be entertained. Quite the contrary. It is a direction simply to the effect that the Court

> in fixing the alimony must not overlook or fail to take into account the property which the wife may have brought into the common fund, nor must the Court fail to consider the value of the real and personal estate of the husband at the time of the decree. Manifestly these are proper considerations, and should have due weight, but certainly it is not to be held that exclusive consideration should be given to them".

The Court went on to hold that in an award of alimony, the future weekly earning power of the husband was a relevant consideration in such a determination.

This American authority is further support for the proposition that the subject phrase is merely directory in scope and does not preclude the relevant authority from considering and giving greater weight to other factors, not outlined in the section of the statute, which it considers to be of pertinent value to its considerations.

5. Sullivan v. Boeing Aircraft Co. [1947], 187 P.R. 312, Supreme Court of Washington.

This case concerned the interpretation of a provision of a labour relations agreement. The relevant provision was to the effect that "the company shall have regard to seniority" if it desired to change the shift its employees were assigned to.

The plaintiff maintained that the subject phrase was synonomous with "governed by" and consequently, because of his seniority his assignment to the night shift was invalid. In dismissing the plaintiff's action the Court said:

> "...We are of the opinion that the expression 'shall have regard to seniority', as used in the agreement, was not intended to have the same meaning as 'will be governed by seniority'.

> We think the term 'shall have regard to seniority' means simply that the company was required to take the matter of seniority into consideration, together with all the other factors presented by the particular situation, and if upon such consideration there was reasonable ground for making the transfer, and no arbitrary disregard of the respondent's (plaintiff) seniority rights, the company would be permitted to make such a change".

The sole obligation placed on the Company by such a phrase, was to address their mind to the seniority of the plaintiff. If anything was mandatory by the use of "have regard to", it was that the company had to, at the minimum, consider the factor enunciated in the provision of the labour relations agreement. Otherwise, the company had discretionary authority to assign employees to different shifts based on their own wisdom.

The authorities are clear that if Section 19 of The Planning Act was amended to require the municipal Council to "have regard to" the Official Plan when it seeks to implement the plan by the enactment of zoning by-laws, the sole obligation of the Council would be to consider or take into account the Official Plan when so enacting. The Council would no longer be under a positive duty to adhere or conform to the contents of the plan as it is presently required to do.

Re Mississauga Golf and Country Club [1963], 40 D.L.R. (2d) 673.

Further, the municipal council would have full discretionary power to determine the weight to be given to the Official Plan when they "have regard" for it.

Ishak v. Thowfeek and Rathbone v. Abel (supra).

The employment of the subject phrase would also permit municipal Councils to consider or "have regard to" other considerations which they deem to be of material relevance. In essence, the phrase imports a discretionary power which municipal Councils would be permitted to use within the bounds already established by the Courts, i.e. in a reasonable manner, solely for the reason the power was granted and not for ulterior motives.

It is to be noted that the authorities outlined above all define the subject phrase in the context of a duty to "consider" which had been placed on the relevant authority. Such interpretation of "have regard to" accords with that given it by the major dictionaries. For example, Oxford Dictionary defines the verb regard as: "to look, to consider, take into account".

B. Attention should thus be turned to the determination of what is involved in a duty to consider, and just how much consideration would a municipal Council be required to give the Official Plan if the relevant Section of The Planning Act was amended as recommended by the Report.

1. Ayles & Romsey and Stockbridge Rural District Council [1944], 88 Sol.Jo. 135.

This case shows just how little is involved in fulfilling a duty to consider. Such a duty was placed on a municipal Council by the Town and Country Planning Act, 1932. The plaintiff challenged the Council's refusal to grant him permission to develop certain land on the grounds that the Council never really considered his application at all prior to the passage of a resolution refusing development permission. Vaisey, J. dismissed the plaintiff's

contention and held that the Council had considered the application since:

> "The plaintiff's plans were on the table at the meeting of the Council and that this was sufficient, as anybody who wanted to could have looked at the plans before the resolution was passed".

The content of a duty "to consider" or "have regard to" specified criteria does not place the most stringent obligation on a municipal Council.

2. Walters v. Essex County Board of Education, [1974] S.C.R. 481.

This case involved an expropriation of the plaintiff's farm land. An Inquiry Officer was commissioned to prepare a report on the intended expropriation. Such report was prepared which recommended that approval of the expropriation be refused. The defendant received the aforementioned report but still granted its approval of the expropriation. The plaintiff brought a declaratory action to annul the action of the defendant on the grounds that they had failed "to consider" the report of the Inquiry Officer as it was required to do by Section 8(1) of The Expropriations Act, R.S.O. 1970, c.154. Laskin, C.J. in dealing with Section 8(1) of the Act which required the defendant "to consider" the report expressed his views as to the extent of this duty as follows:

> "What, then, is involved in its duty to 'consider' the report? Certainly, the Board must have the report before it, and the evidence shows that each member had a copy at least three days before the approval meeting. Although the word 'consider' imports a time element, I do not think a Court can or should impose any arbitrary temporal standard any more than it can or should monitor the degree of required concentration upon the contents of the report. In the present case, the Board was in session on the report in committee of the whole for about one hour and

> one half, and had before it a critical set of opposing reasons which it ultimately accepted. I see nothing improper, in view of the independent power of the Board as an approving authority, in its having a pre-packaged opinion before it prepared by its solicitor. Unless the good faith, indeed the honesty, of the members of the Board is called in question, the fact that they are briefed or counselled in advance to a rejection of the report is not a ground for concluding that they did not 'consider' it. I do not read the duty to 'consider' as imposing upon an approving authority an obligation, if its decision is adverse to the opinion expressed in the report, to show by written reasons that its adverse decision is reasonably founded and hence run the risk of review by the Courts if they should conclude that it is not".

These two cases illustrate that an obligation to consider imposed on an administration body, imposes no practical constraint and is almost hollow. So long as it can be established that the authority under such duty had the relevant data in its possession at some time prior to the time when a decision was made, though no certain time period need be established, this would be sufficient compliance with a duty "to consider" to "have regard to". The fact that the authority at no time actually looked over or familiarized itself with the relevant data would not involve a non-fulfillment of a duty to consider. Essentially, an authority required "to consider" or "have regard to" relevant data or criteria is simply required to be made aware that it exists and not to arbitrarily disregard its existence. [see Sullivan v. Boeing Aircraft Co. (supra)].

The above would seem to be in harmony with the decision in Franklin v. Minister of Town and Country Planning, [1947] 2 All E.R. 289 where a ruling of the defendant was challenged by several local residents who contended that the public proclamations of the defendant to the effect that development of

their area would proceed, despite expected objections, illustrated that the defendant would not, and had not "considered" such objections as required by the Act. The House of Lords, in dismissing the plaintiff's action, in effect held that it was upon them to establish that the Minister had not carried out his duty "to consider" objections. The mere fact that the Minister had made public speeches strongly indicating that the development would go through despite any forthcoming objections, did not establish that he had subsequently failed "to consider" the same, though such consideration was futile in affecting the Minister's ultimate decision. Again, the relevant authority knew the objections existed, and seemingly, this would be sufficient to fulfill a duty "to consider".

C. Conclusions

From the foregoing it is clear that the new proposed wording has a reasonably well defined meaning in law and should not give rise to any uncertainty of interpretation. It will satisfy some of the concerns of the Committee which I have enumerated. However, it will have the practical consequence of emasculating the municipal planning policies in that they may be disregarded at will with impunity. The weight to be given to any policy statement will depend upon the mood of Council from time to time and the effects of lobbying or ratepayer pressure on an ad hoc basis.

I find interesting the emphasis placed by the Committee upon finding words which have some defined meaning and which will therefore give certainty to the amendment recommended when those very words upon that construction will create uncertainty in the planning process. While this is admittedly a policy decision, I would draw an analogy to the basis upon which our Courts follow precedent. Rinfret, C.J.C. put the matter as follows in Golisky v. Romanuik in speaking for the Supreme Court of Canada:

> "It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all Courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined."

My concern is that in an effort to give plans some flexibility the Committee's recommendations will destroy the plan as an effective "planning instrument".

It must be remembered that the Courts are prepared to give generous interpretations in determining conformity with an Official Plan. They are not strictly construed as in the case of a by-law. If the plan contains constraints they are self-imposed as a result of the local municipality itself adopting wording which is too specific.

One might wish to consider an amendment to Section 19 clarifying and expanding the concept of "conformity" to make clear that substantial conformity with the general intent and purpose of the plan is sufficient. I query the need for such an amendment as, in my view, that is the view a Court would take and most plans contain interpretation provisions to that effect. However, some of the concerns of the Committee might be alleviated by a statutory reaffirmation of this liberal approach to the application of the section.

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